

Furthermore, given the fact that Smith was a co-owner, with Tarkenton, of WBTR-FM, there is no plausible reason why he would have asked Jenks to file his counterproposal, other than as an effort to block Design's upgrade. As shown on Exhibit B hereto, a new station operating on the channel proposed for Bowdon would provide primary service to a substantial portion of the area served by WBTR-FM and, thus, would compete directly with WBTR-FM both for audience and advertising revenues. It would have been directly contrary to the interests of Smith and Tarkenton to call anyone's attention to the opportunity to

establish the motive for the scheme and link Jenks, Smith, and Tarkenton in its implementation.

The Commission has expressly recognized that "there is significant potential for abuse of the allotment process" and has taken concrete steps attempting to curb such abuses. Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 (1990). In the instant case, the Commission has been presented with evidence that its processes are being abused by a party with the motive to do so and a history of questionable use of those processes. The Commission should address the situation and dismiss Jenks' counterproposal in this proceeding, rather than wait for further abuses of its processes and allegations that it ignored warning signs of a serious problem.^{9/}

Additionally, in view of the substantial evidence discussed above indicating that Tarkenton and Smith, Commission licensees, abused the Commission's process by having Jenks file a sham counterproposal, the Commission should institute an investigation into the facts and circumstances surrounding the filing of Jenks' counterproposal.^{10/} The Commission has an obligation not to

^{9/} See e.g., "BCCI Clues Went Unheeded Since '84," The Washington Post, September 6, 1991, A1.

^{10/} Design is preparing to file a "Request for Commission Inquiry," asking the Commission to initiate an inquiry, pursuant to Section 403 of the Act, 47 U.S.C. §403, investigating the actions and motivations of Jenks, Tarkenton, and Smith in this proceeding.

allow its administrative process to be abused by purely obstructive pleadings. See United Church of Christ v. F.C.C., 359 F.2d 994, 1005 (D.C. Cir. 1966). See also, Dubuque T.V. Limited Partnership, 4 FCC Rcd 1999, 2000 (1989).

C. THE COMMISSION CAN SATISFY ALL PARTIES BY ALLOTING CHANNEL 223A TO BOWDON.

If the Commission chooses not to dismiss Jenks' counterproposal for the reasons described above, it can still accommodate all parties to this proceeding by adopting the alternative proposal Design previously presented to the Commission, under which the Commission would have allotted Channel 223A to Bowdon, rather than Channel 288A. By so doing, the Commission could have granted the proposed substitutions at Griffin, Sparta, and Hogansville. Design's alternative proposal would therefore have satisfied all parties to this proceeding by enabling them to effectuate their proposals to initiate or improve service to the public. See Design's "Reply Comments" and technical exhibit attached thereto.

In the Order, the Allocations Branch declined to implement Design's alternative proposal for Bowdon on the grounds that the proposed allotment of Channel 223A to Bowdon would violate the minimum distance separation requirements of Section 73.207 of the Rules, as amended effective October 2, 1989. The Branch asserted that it must evaluate the Bowdon

counterproposal, and any alternative thereto, under the new spacing rules in effect for proposals filed after October 2, 1989, even though the Bowdon proposals respond to proposals filed before that date, citing to Second Report and Order in MM Docket No. 88-275, 4 FCC Rcd 6375 (1989).

The Branch's position on this issue is contrary to sound public policy and applicable precedent. Design's alternative proposal would allow the best possible service to the public by accommodating the interests of all parties to this proceeding. The proposal would have enabled both Design and AMCC to upgrade their stations' facilities, and even stations serving Hogansville and Bowdon would have realized substantial service increases.^{11/} This proposal would have resolved the parties' conflicting claims in a manner ensuring the "fair, efficient and equitable distribution of radio service" required by the Communications Act. 47 U.S.C. § 307(b).

The Order nonetheless implemented a resolution which satisfies only one party and potentially serves only one community.^{12/} The dramatic differences between the service

^{11/} As demonstrated in the technical statement attached to Design's Reply Comments in this proceeding, a Bowdon facility operating on Channel 223A with 3 kw would serve 2,248 more persons than a Bowdon facility operating on Channel 288A using 6 kw.

^{12/} Moreover, as discussed supra, given the questionable circumstances surrounding Jenks' counter-proposal, the Commission should question Jenks' motives in filing for an allotment to Bowdon as well as the likelihood that he will ever in fact provide service to that community.

gains that would have been realized under Design's alternative proposal and the gains that may be realized under the allotment adopted in the Order highlights the public policy issues favoring Design's alternative.

Moreover, the Branch was not compelled to reject the alternative under the Second Report and Order in MM Docket No. 88-275. Nothing in that decision, or elsewhere in Commission precedent, compels the result of separating a counterproposal from the underlying proposal to which it responds for purposes of applying the new spacing rules. It would clearly be more reasonable and to consider all parties to a proceeding under the same spacing rules, than to apply different rules to different parties, depending on when they entered the proceeding.

The Policy and Rules Division's recent decision in Gosnell and Osceola, Arkansas, DA 91-920, MM Docket No. 87-

610 released July 22, 1991, wherein the old spacing rules

interest. Gosnell and Osceola, 4 FCC Rcd 6170 (Allocations Branch, 1989). On reconsideration, the Policy and Rules Division declined to resurrect the Osceola allotment, based on the lack of a timely expression of interest. Nevertheless, on its own motion, the Division used "a recent Commission engineering analysis" to locate an alternate channel that it could allot to Osceola using the old spacing rules. In determining to use this procedure, the Division noted that "[t]he availability of an alternate channel for allotment to Osceola removes the need to comparatively consider the merits of the proposals in this proceeding." DA 91-920, slip op. at 5, note 7.

By evaluating the alternate Osceola proposal under the old rules, even though it was not suggested by the Commission until after October 2, 1989, the staff clearly showed that it could and would consider all proposals in a proceeding under the old rules if the initial proposals in that proceeding were filed before October 2, 1989. Moreover, the decision reflects that the staff has the discretion to exercise flexibility to adopt an equitable solution to an allocation proceeding when such a solution would further the public interest with no adverse impact on any party.

The Allocation Branch should similarly evaluate Design's alternate proposal for Bowdon under the old spacing rules. This proposal is part of a proceeding that began under the old rules and it should be receive the same

consideration as the proposals to which it responds. Furthermore, the proposal would resolve this proceeding to the benefit of all. Moreover, this resolution would not lead to a flood of similar petitions, because only a relatively small number of allocations proceedings remain which were opened before October 2, 1989, and fewer still offer the unique public interest benefit of satisfying all parties by application of the old rules. Finally, a refusal by the Branch to assign a channel to Bowdon under the old spacing rules in order to accommodate the Design and AMCC proposals would be arbitrary and capricious as such a refusal cannot be reconciled with the Division's action in Gosnell and Osceola, supra.^{13/}

^{13/} The use of the old spacing rules in Gosnell and Osceola as a basis for allotting a channel to Osceola cannot be justified on the grounds that the allotment of a Class A channel to Osceola had initially been proposed prior to October 2, 1989. In view of the Division's holding that the Allocations Branch had properly refused to consider the late-filed expression of interest in the Osceola channel, the fact there once had been a valid Osceola proposal was of no legal significance and thus provided no basis for the Division's decision to allot a channel to Osceola under the old rules.

D. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Branch reconsider its "Report and Order" in this proceeding, dismiss Jenks' counterproposal as one designed to obstruct and abuse the Commission's administrative processes, and grant Design's and AMCC's inter-related proposals to substitute Channels 248C3 for 249A at Griffin, Georgia; 249C3 for 249A at Sparta, Georgia and 288A for 248A at Hogansville, Georgia. Alternatively, the Commission can satisfy all parties to this proceeding, in a manner consistent with public interest considerations and applicable precedent, by granting the above changes to the Table of Assignments as well as assigning Channel 223A to Bowdon, Georgia.

Respectfully submitted,



David Tillotson
James S. Blitz
ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Telephone: (202) 857-6022

Counsel for Design Media, Inc.

September 19, 1991

EXHIBIT A

DECLARATION OF MICHAEL BERGNER

DECLARATION OF MICHAEL BERGNER

Michael Bergner states under penalty of perjury as follows:

1. I am an attorney and professional radio station broker, and have worked in the brokerage business since 1987. In September, 1990, I was asked to assist Bowdon Broadcasters in its attempt to resolve a contested rulemaking proceeding at the FCC. Specifically, Bowdon Broadcasters and an unrelated third party, Terry Jenks, had each filed proposals to allot FM Channel 288A at Bowdon, Georgia. Those proposals were mutually exclusive with the initial proposal of Design Media, Inc. ("DMI") and Alexander Mitchell Communications Corp. ("AMCC") to upgrade Station WQUL(FM), Griffin, Georgia, by changing that station's channel from 249A to 248C3, and to upgrade Station WSKS(FM), Sparta, Georgia by changing that station's channel from 249A to 249C3. Both of those latter proposals were contingent on the use of Channel 288A at Hogansville, Georgia.

2. After the counterproposals were filed, Bowdon Broadcasters received offers from DMI and AMCC to pay it to dismiss its counterproposal, which offers Bowdon Broadcasters was willing to accept. The amount that DMI and AMCC were willing to pay Bowdon Broadcasters for the dismissal of its counterproposal was significantly greater if Mr. Jenks also agreed to dismiss his counterproposal. Bowdon Broadcasters and the other parties to the rulemaking attempted to get in touch with Mr. Jenks to see whether, and on what terms, he would dismiss his counterproposal by writing to him at the address in Louisville, Kentucky that he had listed in his counterproposal. The letters were unanswered. Efforts were also made to obtain a telephone number for Mr. Jenks, but his phone was unlisted. After trying without success to initiate settlement negotiations with Mr. Jenks by mail, Bowdon Broadcaster's retained me to go to Louisville, Kentucky to speak with Mr. Jenks face-to-face and see whether I could persuade him to accept reasonable terms for the dismissal of his counterproposal.

3. I flew to Louisville on Saturday, September 22, 1990, and, on my arrival that afternoon, I went to Mr. Jenk's home, unannounced, where I found him working in his garden. Mr. Jenks was obviously surprised by my sudden appearance, and by my questions concerning his counterproposal. In response to my questions, it was apparent that Mr. Jenks knew nothing about broadcasting or the FCC's rulemaking or

interested in settling the case or even discussing possible settlement terms. In my experience, such a total unwillingness to discuss settlement by a person such as Mr. Jenks, who is neither local to the area where a channel is proposed nor a minority, and thus, could have no realistic expectation of winning a comparative hearing were the proposed channel allotment to be made, was highly unusual.

4. Subsequently, in a later phone conversation I learned from Mr. Jenks that his friend who suggested that he file for the station was an attorney in Carrollton, Georgia, Gleemer Lee Smith.

5. As I was aware from DMI that Dallas Tarkenton had threatened DMI that he would file a counterproposal in MM Docket 90-309 to block WQUL's proposed upgrade, and that Tarkenton owns a station in the Carrollton, Georgia, area, and based on the fact that Tarkenton had the most to gain if the upgrade was blocked, I suspected that Gleemer Lee Smith was also Tarkenton's attorney and had contacted Mr. Jenks on Tarkenton's behalf. To confirm this suspicion, I called Gleemer Lee Smith's office in Carrollton, Georgia, shortly after my visit to Mr. Jenks. When the receptionist answered the phone, I asked to speak to Dallas Tarkenton. She responded that Mr. Tarkenton had left the office "just a few minutes ago," and she offered to take a message for him.

Date: 9/7/91



Michael Bergner

EXHIBIT B

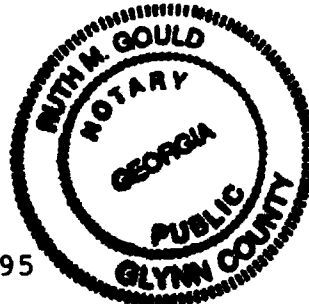
TECHNICAL STATEMENT

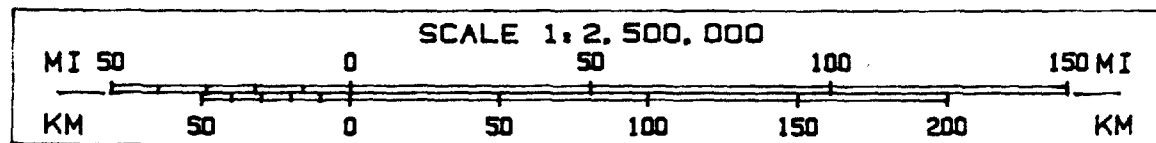
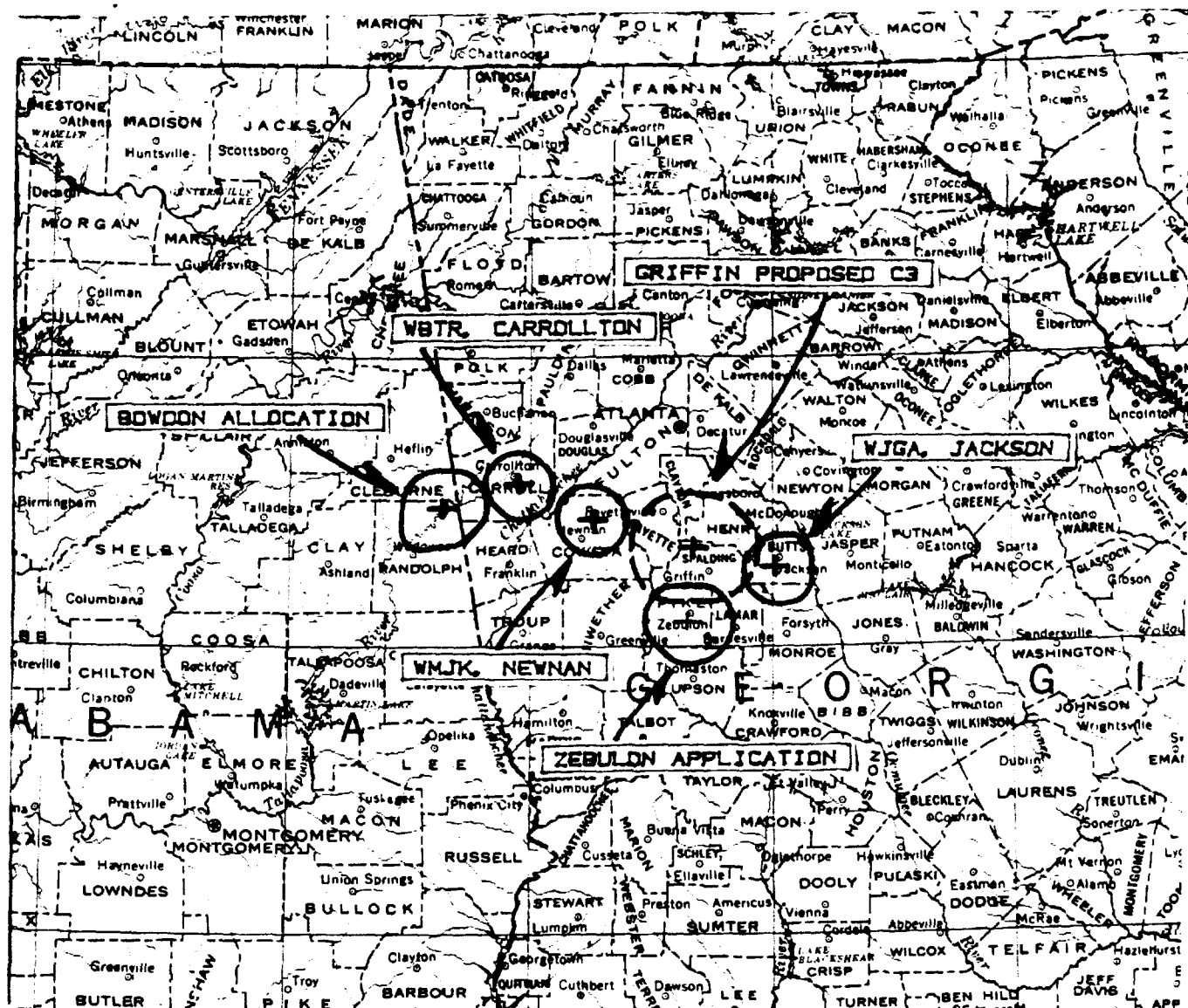
TECHNICAL STATEMENT
DESIGN MEDIA, INC.
WQUL (FM) RADIO STATION
GRIFFIN, GEORGIA
September 1991

The enclosed exhibits were prepared by Bromo Communications, Inc. on behalf of Design Media, Inc., WQUL (FM) licensee. Exhibit #1 indicates the 70 dBu of a Class A allocation at Bowden, Georgia; WBTR (FM), Carrollton, Georgia; WMJK, Newnan, Georgia; the application of Steven D. Tarkenton at Zebulon, Georgia and the license of WJGA, Jackson, Georgia. All of these 70 dBu contours are shown with solid lines and are contrasted with the 70 dBu of the C3 proposal at Griffin, Georgia by Design Media, Inc. shown on the exhibit with broken lines. Exhibit #2 indicates the same facilities with a 60 dBu contour.

The following is a list of coordinates and facilities used to determine these contours.

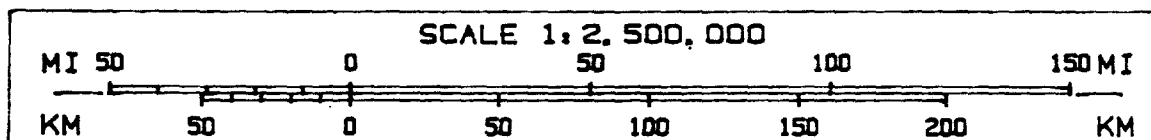
| | |
|---------------------------------|---|
| Zebulon, Georgia | 33 05 11 North Latitude 84 19 11 West Longitude 6 KW 349 meters HAAT |
| WMZK Newnan, Georgia | 33 26 22 84 42 42 1.0 KW 432 meters HAAT |
| WBTR Carrollton, Georgia | 33 33 54 85 01 02 .58 KW 498 meters HAAT |
| WJGA Jackson, Georgia | 33 16 37 83 57 59 2.15 KW 304 meters HAAT |
| Bowden, Georgia | 33 28 54 85 19 34 6 KW 399 meters HAAT |
| Griffin, Georgia Proposed C3 | 33 20 30 84 18 00 25 KW 352 meters HAAT |





TARKENTON RELATED - 70 HRU

EXHIBIT #1



TARKENTON RELATED - 60 dBu

EXHIBIT #2
DESIGN MEDIA, INC.
WQUL (FM) RADIO STATION
GRIFFIN, GEORGIA

SEPTEMBER 1991

BROMO

BROADCAST
TECHNICAL CONSULTANTS

EXHIBIT C

DECLARATION OF LEONARD BOLTON

DECLARATION OF LEONARD BOLTON

proposal would effectively block DMI's proposed upgrade by precluding the channel substitution that DMI had proposed for Hogansville. He stated that he had not told any of the other Hogansville applicants about the possibility of blocking WQUL's upgrade and that he doubted whether any of them would think of the possibility on their own. He then stated that he would continue to try to settle the Hogansville proceeding and that, for a price, he would not interfere with DMI's efforts to upgrade WQUL. In the course of my conversation with Mr. Tarkenton, he stated that he had no desire to serve any particular community, but rather, "was in it [presumably referring to the application process] for the money." He also told me that he had been involved in a lot of rulemaking proceedings and had made money in every one.

6. I had never met or spoken with Mr. Tarkenton prior to returning his call on January 30, 1990. I regarded Mr.

an analysis of sales of comparable stations to determine what WQUL would be worth as a Class C3 station, established that the value of WQUL as a Class C3 station would be in excess of \$5 million.

10. Although DMI challenged the bona fides of Jenk's representations that he intended to apply for, and construct, a station in Bowdon, Georgia in the original rulemaking proceeding, DMI did not submit the information contained herein in the rulemaking proceeding because it had no reliable evidence linking Dallas Tarkenton's threat to block WQUL's upgrade to Jenk's Bowdon counterproposal. After the Commission released its Report and Order in MM Docket 90-309, a former consultant to Bowdon Broadcasters, Michael Bergner, provided DMI with a declaration under penalty of perjury which established that a direct connection did exist between Dallas Tarkenton's threat to file a blocking counterproposal, his unsolicited offer to purchase WQUL, and the filing of Jenk's counterproposal to use Channel 288A at Bowdon.

Date:

Sept 9, 1991


Leonard A. Bolton



FILE MEMO

1/30/90

Re: Dallas Tarkenton
Conversation

On Tuesday, January 30 at 9:45, Dallas Tarkenton called me at my Griffin, Georgia offices. I was engaged in a meeting and returned his call at 11:00 am.

Mr. Tarkenton revealed that he had discovered through his engineer that we had petitioned for rulemaking to upgrade WKEU-FM from Class A at 97.7 to Class C-3 at 97.5, substituting 105.5 as a workable frequency for the applicants for the Hogansville Georgia allocation.

Mr. Tarkenton stated that his son was one of the Hogansville applicants, but that he (Dallas) put up the money and 'called all the shots'. Mr. Tarkenton further revealed that he, acting as power of attorney for his son had attempted to settle the Hogansville process by buying out the other three applicants. Later in the conversation, upon questioning from me, he stated that he had offered each of the other applicants \$100,000 to step aside.

Mr. Tarkenton stated that the purpose of his call was to see if he could work with us and make some money for himself through a payment from us to secure his cooperation.

He told me that he could put in an application on 105.5 for one or the other of two towns in the area not presently served by radio, effectively blocking Hogansville from using 105.5 and us from getting an upgrade using 97.5.

Observation:

If Mr. Tarkenton's son is a bona-fide applicant, why is daddy calling the shots in violation of certain FCC regulations?

Secondly, this is the most blatant example of attempted extortion that I can cite from personal experience, and ought to be a criminal violation if indeed it is not.

I immediately called Gil Moor, our consulting engineer and related this event to him to enlist his aid in seeking counter-strategies. Later on January 30, I reached our FCC attorney, Jay Baraff to ask him to formulate alternate strategies and research our legal position.

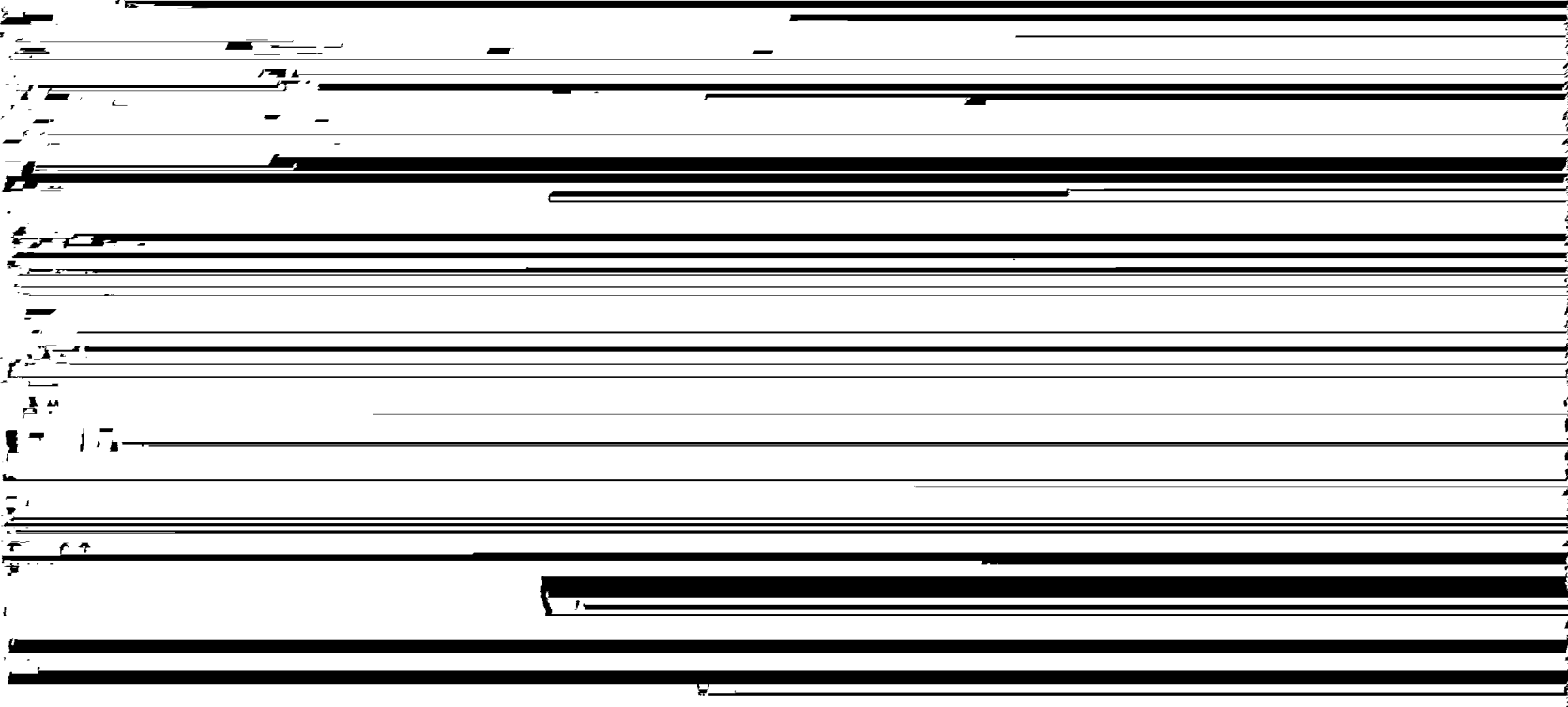



EXHIBIT D

PURCHASE OFFER FROM DALLAS TARKENTON